Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the matter of	]	
	]	
MARC SOBEL	]	WT Docket No. 97-56
	]	
Applicant for Certain Part 90 Authorizations in the Los Angels Area and Requestor of Certain Finder's Preferences	]	
	]	
MARC SOBEL AND MARC SOBEL D/B/A AIR WAVE COMMUNICATIONS	]	
	]	
Licensee of Certain Part 90 Stations in the Los Angeles Area	]	

To: The Honorable John M. Frysiak
Presiding Administrative Law Judge

REPLY TO THE WIRELESS TELECOMMUNICATIONS BUREAU'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Marc D. Sobel d/b/a Air Wave Communications ("Sobel"), by his attorney and pursuant to Sections 1.263 and 1.264 of the Commission's Rules and Regulations, 47 C.F.R. § 1.263-1.264, and pursuant to the Presiding ALJ's Order, FCC 97M-134 (released 5 August 1997), hereby offers his reply to the Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law ("*WTB Findings*") in the captioned proceeding, in support whereof the following is respectfully shown:

I. THE MISREPRESENTATION / LACK OF CANDOR ISSUES

A. INTRODUCTION

1. By his *Memorandum Opinion and Order*, FCC 97M-82, released 8 May 1997, the Presiding ALJ, acting upon a motion to enlarge submitted by the Wireless Telecommunications Bureau ("Bureau"), enlarged the scope of the proceeding by adding the following issues:

(a) To determine whether Marc Sobel misrepresented material facts or lacked candor in his affidavit of January 24, 1995.

(b) To determine, based on the evidence adduced pursuant to the foregoing issue, whether Marc Sobel is basically qualified to be and remain a Commission licensee.

Id. at pp. 2-3 (first ordering clause). The burdens of proceeding and proof were placed on the Bureau. *Id.* at p. 3 (second ordering clause). The Bureau has utterly failed to carry its burdens in this regard.

2. A charge of misrepresentation and lack of candor is extremely serious. A licensee's candor "is an issue of utmost importance." *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8478 (1995). While lack of candor is characterized by failure to disclose material information, misrepresentation is characterized by making a material false statement to the Commission. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). An intent to deceive, however, is an essential element of either charge. *Pinelands, Inc.*, 7 FCC Rcd 6058, 6065 (1992). Indeed, the nature of the misrepresentation or lack of candor is essentially irrelevant, because it is the "willingness to deceive" that is most significant. *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946). *See generally Roy M. Speer*, 11 FCC Rcd 18393, 18421 (1996).

3. Throughout the discovery phase of this proceeding, the Bureau unearthed absolutely no evidence of an intent on the part of Marc Sobel to deceive the Commission. During the trial of this hearing, the Bureau offered no such evidence. Nonetheless, the Bureau continues to assert the baseless claim and to seek the ultimate penalty, regulatory capital punishment. Given the gravity of this issue, one would expect to Bureau at some point to put aside its role of adversary, and assume the mantle of public servant and truth seeker. But that has not happened. One can only theorize that the Bureau's judgment is clouded by the fact that Sobel does in fact have a close personal and business relationship with James A. Kay, Jr. ("Kay"), a person for whom the Bureau has a great deal of animosity. But the Bureau's suspicions about James Kay, even assuming they are well founded and eventually vindicated, should have no bearing on its attitude toward Sobel. Accordingly, the Presiding ALJ's "analysis must be laid on a more dispassionate plane," because the Commission should not and "do[es] not practice guilt by association in [its] review functions." *Lowery Communications, L.P.*, 71 FCC Rcd 7139 47 (1992). This is true in cases where the "associated" party has already been found unqualified by the Commission, and it is all the more true here where Kay has not yet had his day in court.

4. The Bureau has stacked together a motley collection of largely undisputed facts, and then attempts to argue from this shaky foundation that Sobel lied or stated half-truths to the Commission. This effort fails for two reasons. First, the Bureau's argument presents but one possible interpretation of the facts, and even then not a particularly plausible one. Second, and much more importantly, the

Commission points to absolutely no fact whatsoever indicating the presence of the essential element of scienter on Sobel's part. "The ultimate factual question ... at issue is whether [Sobel] intentionally misled the Commission. *Roy M. Speer*, 11 FCC Rcd at 18422 (emphasis added). The "intent to deceive" is an "essential element" of a violation of the duty of candor. *Swan Creek*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Garden State Broadcasting Limited Partnership v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993); *Fox River Broadcasting, Inc.*, 102 F.C.C.2d at 1196 (1986). "It therefore follows that before an applicant or licensee may be found to have withheld relevant information, it must be shown that the party knew that the information was relevant and intended to withhold it." *Fox Television Stations*, 10 FCC Rcd at 8478, *citing Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993). The Bureau has not carried its burden of proving that there even was any misrepresentation or lack of candor, much less that it was intentional.

B. SPECIFIC ALLEGATIONS OF MISREPRESENTATION OR LACK OF CANDOR

5. The Bureau offers four instances in which it claims Sobel misrepresented information to or improperly withheld information from the Commission: (a) in certain application return notices, *WTB Findings* at 28; (b) by his failure to submit a copy of the written agreement between Sobel and Kay, *WTB Findings* at 29-30; (c) in a 6 December 1994 letter to Gary Stanford of the FCC in Gettysburg PA, *WTB Findings* at 30-31; and (d) in two affidavits executed by Sobel on 11 January 1995 and 24 January 1995, *WTB Findings* at 31-39. When the entire record is considered, however, and when the Bureau's individual and isolated allegations are considered in the context of "the totality of the circumstances," *see Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8456 8 (1995), it becomes clear that this issue must be resolved in Sobel's favor. The Bureau has utterly failed to carry its burden of proof, and the record in fact exonerates Sobel of this serious charge. We shall address each of the Bureau's alleged instances of misrepresentation and lack of candor seriatim.

(1) Responses to Application Return Notices

6. The Bureau first cites three letters submitted to the Commission by Sobel in early 1993 in response to application return notices. (WTB Ex. Nos. 19, 21, 23). The Bureau alleges that the redaction of the billing address (which was that of Lucky's Two-Way Radios, a Kay trade name) from attachments to these letters constituted an improper withholding by Sobel of information from the Commission. But

there are a number of problems with the Bureau's theory. First, the record is clear that Sobel did not mark out the information in question. (Tr. 87-98) It was more than likely excised by Kay, although he has no specific recollection of doing so. (Tr. 335-339)[1] Although Sobel assumes the attachments, as marked, were with the letters at the time he reviewed and signed them, he does not have a specific recollection of that fact. He certainly did not mark out the information himself, nor did he allow the information to be marked out with the intention of improperly withholding information from the Commission. Neither Sobel nor Kay considered the billing address to be relevant to the matter being addressed in these letters, and it in fact was neither relevant nor material. The purpose of the letters was to provide the Commission with evidence that a specified number of users were actually receiving service on the channels in question. The location of the billing address and the identity of the billing agent were immaterial to the matters under consideration by the Commission. Even the Bureau did not deem this information to be of any significance because, as a result of Sobel's letters, it re-accepted, processed, and granted the subject applications without making any inquiry to Sobel regarding the excised portions of the attachments.[2]

(2) The Management Agreement

7. The Bureau also charges Sobel with lack of candor because he did not voluntarily submit the written agreement between him and Kay to the Commission. *WTB Findings* at 29-30. But Sobel never had any intention of hiding the existence or content of the written agreement from the Commission, nor has the Bureau offered any evidence of such intent. Sobel and Kay had operated for two to three years on the basis of an oral understanding that was entirely satisfactory to both parties. (Tr. 257-258) Sobel was aware, of course, that Kay was the subject of an investigation by the Bureau. In 1994, Sobel learned that certain undisclosed parties had apparently complained to the Commission about Sobel's relationship with Kay. (Tr. 108-109) In late September or early October of 1994, Sobel learned of a draft hearing designation order in the Kay investigation which included the following language: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of

[1] While Sobel does not deny that that the information was marked out on the documents as submitted to the Commission, the Bureau has nonetheless presented no conclusive evidence that (a) the information was in fact blacked out of the originals, or (b) that any such redaction was done by Kay or Sobel.

[2] The letters in question were submitted with respect to applications in FCC File Nos. 614563, 614564, and 614566. These applications are not among the pending applications designated in this proceeding. The Presiding ALJ may take official notice of the fact that these applications were, after receipt of the letters in question, processed and granted by the Commission.

names. Kay could use multiple names to thwart our channel sharing and recovery provisions ... . We believe these names include ... AirWave Communications [and] Marc Sobel, d/b/a AirWave Communications." (Tr. 166, 259-262) Upon learning this, Sobel asked that the relationship between him and Kay be reduced to writing in order to document the separateness and distinction of his identity and business from those of Kay. (Tr. 262-263)

8. Sobel wanted the written agreement precisely because he wanted to clarify, not conceal, his relationship with Kay regarding the 800 MHz repeaters. Sobel did not, at that time, voluntarily submit the agreement to the Commission, but that fact hardly constitutes evidence of misrepresentation or lack of candor. Sobel was under no affirmative obligation to submit the agreement to the Commission. Unlike requirements in certain broadcast and common carrier services, Part 90 applicants are not called upon to provide detailed ownership information, and Part 90 licensees are not required to file management and other types of agreements. It was nonetheless Sobel's belief and understanding that a copy the agreement would be provided to the Commission in the discovery phase of the Kay license revocation proceeding, and that the nature and extent of Kay's relationship with Sobel would also be explored in that context. (Tr. 299-306)

9. Common sense compels the conclusion that Sobel did not have any intention of concealing the agreement from the Commission. If it had been Sobel's intention to conceal the existence or obfuscate the nature of his relationship with Kay, he certainly would not have asked for a written agreement at a time he knew the Commission was investigating Kay. Sobel knew that Kay was being investigated, and he knew that the Commission mistakenly believed he was a fictional alias being used by Kay. It was precisely in reaction to this information that Sobel asked that the oral arrangement be reduced to writing. Sobel's information was confirmed when the Commission, in December of 1994, the Commission released its formal designation order in the Kay proceeding. Not only did the order include the same language that had been in the earlier draft, it now included an exhibit that listed the call signs of several licenses issued in Sobel's name. It is therefore entirely reasonable and credible for Sobel to have believed, as he testified he did, that the Commission would become fully aware of the written agreement in that proceeding. There is no evidence whatsoever that Sobel intended to conceal or did conceal the agreement from the Commission, and the evidence that is in the record supports the opposite conclusion.

(3) The Stanford Letter

10. The Bureau next points to a letter, dated 6 December 1994, sent by Sobel to Mr. Gary Stanford of the FCC staff in Gettysburg PA. (WTB Ex. 46) The Bureau attempts to twist this letter into an example of misrepresentation and lack of candor by Mr. Sobel, but it actually contradicts the Bureau's position. The statements made in the Stanford letter must be considered in their proper context. By late 1994 Sobel had become aware that the Bureau was withholding action on his applications, apparently due to an erroneous assumption that he in fact was James Kay. Sobel wrote the letter to Gary Stanford in order to clarify that Sobel and Kay were two separate and distinct individuals, and to ask that any "black listing" of Sobel's applications be lifted. The letter accurately stated that Mr. Sobel was "an Independent Two Way Radio Dealer," that he was "not an employee of Mr. Kay or of any of Mr. Kay's companies," and that he was "not related to Mr. Kay in any way." Sobel went on to explain: "I have my own office and business telephone numbers. I advertise under my own company name in the Yellow Pages."

11. The Bureau absurdly faults Mr. Sobel for not having, in this letter, spelled out each and every specific detail of all of his business dealings with Kay. Sobel was certainly under no such obligation, and it is unreasonable to expect that he would have done so at that time and in that context. There was no reason for Sobel to believe that that the Commission thought there was something improper in the terms of his relationship with James Kay; rather, his concern was that the Commission thought he was James Kay. The Bureau is now, after the fact, selectively juxtaposing various aspects of the business arrangements between Kay and Sobel, drawing its own biased legal conclusions therefrom, and then holding Sobel responsible for not coming to the same legal conclusions in December of 1994 and *sua sponte* disclosing them to the Commission in a vacuum. This would be an unreasonable expectation of any party under any circumstances, but is particularly unreasonable to have expected that of Sobel in this situation. Sobel is not a lawyer. He is a high school graduate with less than two years of college education. He is a sole proprietor of a small, one-man business. Although he did a considerable amount of business with James Kay, he never became an employee of Kay, and he always maintained his own separate business and his own independent business identity. He considered himself then, and still considers himself today, to be independent of Kay. The Bureau may perhaps dispute the legal soundness

of Sobel's belief in this regard, but it has presented absolutely no evidence whatsoever to dispute that this was his honest and sincere belief.

12. Moreover, the Stanford letter, on its face, defeats the Bureau's interpretation. Sobel states in the letter his belief that action on his applications is being withheld "due to my association with Mr. Kay." The letter also states: "My business and tax registration and resale tax permits go back to 1978 - long before I began conducting any business whatsoever with Mr. Kay." Those statements constitute an admission of, not a failure to disclose, a business affiliation between Sobel and Kay. The letter concluded with the following offer: "Should you need further assistance ... in this matter, please call me at your convenience."

13. Thus, the record reveals that as early as October 1994 the Bureau was operating under the erroneous assumption that Sobel was a fictitious name being used by Kay to thwart certain unspecified Commission rules or policies. As a result of this, the Bureau began withholding actions on Sobel's applications, but never made any attempt to contact Sobel to inquire about its concerns or suspicions. In December of 1994, Sobel wrote the Bureau a letter in which he (a) acknowledged a business relationship with Kay, but asserted his identity as a distinct individual and a separate business entity, and (b) expressly invited the Commission to contact him if it required further information.[3] There is no conceivable interpretation of these indisputable facts that can twist them into evidence of misrepresentation or lack of candor.

[3] The Bureau made no attempt to respond to this invitation and seek additional information from Sobel. Instead, the Bureau continued its unexplained moratorium on processing Sobel's applications and proceeding to acquiesce in, if not manipulate, the Commission's adoption of a hearing designation order in the Kay proceeding based at least in part the assumption that Sobel was a fictitious alter ego of Kay--information the Bureau knew or should have known was false. Even assuming the Bureau was honestly mistaken about Sobel's identity, the Stanford letter should have given it reason to inquire further. Instead, the Bureau stood silently by, ignored the Stanford letter, and allowed the Commission to adopt a designation order based on erroneous information. It is thus ironic that the *Bureau* now accuses *Sobel* of misrepresentation and lack of candor based on the Stanford letter. The record would better support a finding that it is the Bureau that was less than candid with the Commission.

(4) The January 1995 Affidavits

14. Finally, the Bureau asserts that Sobel misrepresented information to or lacked candor with the Commission in two 1995 affidavits, executed by Sobel on January 11 and 24, respectively. The Bureau complains of Sobel's failure to disclose in the affidavits "any description of the actual relationship between Sobel and Kay with respect to the Management Agreement stations." *WTB Findings* at 33. This is a rather silly objection in that it fails to take into account the context in which the affidavits were offered. As discussed above, prior to the date these affidavits were filed, Sobel had already written to the Bureau making similar assertions and inviting the Bureau to contact him if it required additional information. Second, the affidavits, although signed by Sobel, were not prepared by him and were not presented to the Commission on his behalf. They were prepared by the law firm of Brown and Schwaninger in support of pleadings submitted on behalf of Kay in the Kay license revocation proceedings. (Tr. 154) Sobel generally understood that the pleading would, in part, seek removal of Sobel's call signs from the Kay proceeding on the grounds that Sobel was an individual separate and distinct individual from Kay, rather than a fictitious entity as assumed in the designation order. (Tr. 142-143) Beyond that, however, he was not familiar with the details of the pleadings to which his affidavits were attached. He did not review a draft of those pleadings prior to the signing and submission of the affidavits, and if fact did not read them until preparation for this hearing. (Tr. 161-165) The pleadings were in fact filed solely on Kay's behalf, and not on Sobel's, and only a small portion of them was directed at the Sobel / Kay matter. (WTB Ex. 42)

15. Apart from the fact that the affidavits were not offered on Sobel's behalf and were offered in the specific context of a pleading which he did not review, the failure of the affidavits to disclose more details does not indicate lack of candor. The affidavits were offered in the context of an adversarial pleading presented in an adjudicatory hearing proceeding. Neither the Bureau nor the Commission made any effort to name Sobel as a party to that proceeding or properly serve him with the designation order.[4] If the Bureau, which had allegedly investigated Kay and Sobel extensively, believed the presentation was lacking in detail, it could have opposed the request that Sobel's licenses be excluded from the Kay hearing proceeding. In the context of the back and forth of adjudicatory pleadings, more information could

[4] That the Commission and the Bureau were under the mistaken belief that Sobel was a fictitious entity did not deprive Sobel of his notice and hearing rights provided in Section 312(c) of the Communications Act. 47 U.S.C. § 312(c).

have been disclosed if necessary. Kay, one of the two parties to the Kay license revocation proceeding, made a procedural request based on an accurately stated summary of a factual situation. The Bureau, the only other party to that proceeding, neither opposed the request at the time nor suggested that Kay's proffer was incomplete or inaccurate. Sobel, who was not even a party to the proceeding, can not be faulted for not then volunteering a more detailed factual statement.

16. Not only did the Bureau not oppose Kay's request that the Sobel call signs be excluded from the scope of the designation order, the Bureau later made precisely the same request on its own behalf. In an effort to clear a path for its own motion for summary decision in the Kay proceeding, the Bureau in 1996 prevailed upon the Presiding ALJ in that proceeding as well as the full Commission to remove the Sobel call signs from the Kay designation order. By this time, the Bureau had been provided, in discovery, with a copy of the written management agreement between Sobel and Kay.[5] Nonetheless, at no time during that process did the Bureau suggest to the Presiding ALJ or to the Commission that it believed Kay was the true party in interest with respect to the Sobel licenses by virtue of the written agreement. The Bureau apparently continued to harbor questions regarding the relationship between Sobel and Kay, but it failed to disclose that it suspected an actual transfer of control of the very licenses at issue on the basis of a written agreement in its possession. Rather, the Bureau merely stated "that the extent of the relationship between Kay and the ... Sobel licenses was unclear and should be explored initially in a nonadjudicatory investigation." *James A. Kay, Jr.*, ___ FCC Rcd ___ (FCC 96-200; released 7 May 1996).[6] The Bureau did not consider the management agreement of sufficient significance or materiality to warrant disclosure as part of its own 1996 effort to remove the Sobel licenses from the proceeding, and the agreement was equally irrelevant to the Kay's virtually identical request in 1995. Either the written agreement was not material information with respect to the issue of removing the Sobel

[5] The Presiding ALJ may take official notice that a copy of the written agreement was produced to the Commission on 24 March 1995, as an attachment to Kay's *Responses to Wireless Telecommunications Bureau's First Request for Documents* in WT Docket No. 94-147, the Kay license revocation proceeding.

[6] The sincerity of the Bureau's promise of an "investigation" is also in doubt, given what has transpired. From May of 1996, when the Commission removed the Sobel call signs from the Kay proceeding, to February of 1997, when the Commission adopted the designation order instituting this proceeding, the Bureau obtained virtually no information or documentation regarding the Sobel-Kay relationship that it did not already have--or at least no such additional information was evident during discovery or the hearing.

licenses or the Bureau is guilty of exactly the same lack of candor that it now seeks to lay at Sobel's feet. The Bureau can not have it both ways.

17. Except for the dates, the affidavits are identical. These affidavits certainly do not constitute misrepresentation, because there is nothing factually inaccurate or untruthful in them. There are six distinct factual assertions made in the affidavits: (a) "Marc Sobel [is] an individual, entirely separate and apart in existence and identity from James A. Kay, Jr."; (b) "Mr. Kay does not do business in [Mr. Sobel's] name and [Mr. Sobel] do[es] not do business in [Mr. Kay's] name"; (c) "Mr. Kay has no interest in any radio station or license of which [Mr. Sobel is] the licensee"; (d) Sobel has " no interest in any radio station of which Mr. Kay is the licensee"; (e) Sobel is "not an employer or employee of Mr. Kay, [is] not a partner with Mr. Kay in any enterprise, and [is] not a shareholder in any corporation in which Mr. Kay also holds an interest;" (f) Sobel is "not related to Mr. Kay in any way by birth or marriage." Each of these statements was true at the time Sobel executed the affidavits, and remain true today. Even the Bureau does not question the veracity of three of these statements, so we now address only the three that are disputed by the Bureau.

(a) "Mr. Kay has no interest in any radio station or license of which [Mr. Sobel is] the licensee".

18. According to the Bureau, Sobel lacked candor in making this statement without specifically disclosing the full details of the business relationship between him and Kay, including the written management agreement. Sobel testified at hearing that he interprets the word "interest" to mean an "ownership" interest in the licenses. Sobel was (and remains) the licensee of the 800 MHz stations and thus considered himself to be the "owner" of the licenses. (Tr. 146-147) The licenses were issued in his name, sent to his address, and operations under them were undertaken only by reason of business arrangements made by him. While it is true that Kay owned the equipment and the transmitter sites (which he subleased to Sobel), this did not, in Sobel's view, give Kay an "interest" in the licenses themselves. Kay contracted with end users and collected the revenues for service, but this was, in Sobel's experience, the nature of resale and/or channel capacity lease arrangements that were typical in the industry. He did not consider this as giving Kay an "interest" in the licenses. Finally, while the written agreement gave Kay an option to acquire the stations, Sobel did not believe this would give Kay an "interest" in the licenses unless and until (a) Kay exercised the option, (b) the Commission approved an

assignment of the licenses, and (c) the deal was closed. (Tr.148, 269-270) As a matter of law, a mere option, unless it is exercised, does not rise to the level of an actual ownership interest cognizable for most purposes under FCC regulation and policy, including questions of real party in interest and transfer of control. *Turner Broadcasting System*, Inc., 101 FCC 2d 843, 849 (1985); *Miller Communications, Inc.*, 3 FCC Rcd 6477, 6479 (Mob. Serv. Div. 1988).

19. Both the affidavits and the written agreement were prepared by the law firm of Brown and Schwaninger ("B&S") in less than a three month span of time. B&S had assured Sobel that the written agreement satisfied FCC requirements. (Tr. 263) Sobel did not seek advice from B&S regarding the affidavits (Tr. 264), but Mr. Kay did speak to B&S after receiving the first affidavit. (Tr. 371) Based on the Bureau's own leading cross-examination questions, Mr. Kay, based on his conversation with B&S, who also served as Sobel's attorneys on many matters, advised Sobel that "to the best of [Kay's] knowledge, as it had been explained to [Kay by B&S], it [*i.e.*, "interest"] referred to ownership as in a partnership or ownership of stock, as having a direct financial stake in something. Being an owner or a stockholder or direct party to something." (Tr. 371) Thus, Sobel's interpretation of the word "interest" was made in good faith and on the advice of known FCC counsel. The Bureau asks us to believe, however, that B&S would have prepared the management agreement between Sobel and Kay, and then, less than three months later, ask Sobel and Kay to execute sworn statements that (if the Bureau's interpretation of "interest" is accepted) effectively deny the existence of this same agreement. Credulity can not be strained that far. The fairer reading of the record is that both Sobel and Kay, based on both the actions and explicit advice of FCC counsel, did not consider the management arrangement to constitute an "interest" within the meaning of the affidavits.

(b) Sobel is "not an employer or employee of Mr. Kay".

20. The Bureau, pointing to the services performed by Sobel for Kay as an independent contractor, asserts that this statement was erroneous or misleading. The Bureau accuses Sobel of engaging in legal technicalities by asserting his non-employee status.[7] But the record is clear that Sobel is a separate and distinct business entity from Kay. Sobel and Kay both testified that Sobel has never been an employee of Kay, and Sobel has presented tax records consistent with his claim of independent

contractor status. (Tr. 144, 151, 158, 246-247, 271, 327) The Bureau has offered no contradicting evidence.

(c) "Mr. Kay does not do business in [Mr. Sobel's] name and [Mr. Sobel] do[es] not do business in [Mr. Kay's] name".

21. Sobel and Kay have at all times maintained separate business identities. Neither one has ever held himself out as an employee or partner of the other. Despite its inability to present any evidence disputing these facts, the Bureau nonetheless questions this statement in the affidavits because Sobel sometimes contacts existing or potential customers on Kay's behalf, and because Kay contracts with the end users of Sobel's 800 MHz stations for service and collects the revenues for such services. The record shows that all services performed by Sobel on Kay's behalf were done as an independent contractor. The mere subcontracting of some aspect of a business operation, especially when done on a case-by-case basis, does not transform the subcontractor into one doing business in the principal's name. Nor does Kay's dealings with end users constitute his doing business in Sobel's name or vice versa. Kay contracts with the end users and collects the revenues because these are Kay's, not Sobel's, customers. Sobel and Kay both testified that they consider their arrangement to be in the nature of a resale or channel lease agreement that is typical not only in the SMR services specifically, but in mobile wireless services generally (including cellular and paging). (Tr. 90, 128, 153, 190-192, 374-376) There are any number of wireless communications carriers who provide service on facilities licensed to another entity, with the facilities-based licensee having no privity with the end users. Such arrangements are not only permitted by the Commission, they are specifically encouraged.[8] But the reseller is not deemed to be doing business in the name of the facilities based carrier absent a specific undertaking and express holding out

[7] The Bureau, in self serving fashion, attributes to Sobel all of the sophisticated legal nuances of the word "interest," while restricting him to a colloquial meaning of the word "employee".

[8] *See e.g. Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261, 271 (1976), modified on other grounds, 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); *Cellular Communications Systems*, 86 FCC 2d 469, 511, 642 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982); *Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies*, 7 FCC Rcd 4006, 4008 (1992).

to do so. Kay has never claimed to do business in Sobel's name, and Sobel's statement is therefore entirely correct.[9]

22. Insofar as Sobel was concerned, the purpose of the affidavits was to assist in correcting an erroneous statement in the Kay designation order that Sobel was a fictitious name used by Kay and that implicit assumption that Sobel did not exist as a separate and distinct person. Each of the specific statements made in the affidavits is factually true. Moreover, the Bureau has offered no evidence suggesting that Sobel intended to mislead the Commission in any way by virtue of the affidavits.

C. THE PROPRIETY AND REASONABLENESS OF SOBEL'S CONDUCT AND REPRESENTATIONS

23. Not only did Sobel not withhold relevant information from the Commission, he made efforts to provide it. As already noted, in the December 1994 letter to Gary Stanford, Sobel volunteered to provide additional information to the Commission upon request, but the Bureau never made such a request until more than a year later. On 16 January 1996 the Bureau first requested additional information from Sobel in a formal request pursuant to Section 308(b) of the Communications Act. (SBL Ex. 6, p. 24]. Through counsel, Sobel indicated his intention to answer the request completely and in a timely manner. (SBL Ex. 6, p 39). The Bureau's reaction to that good faith offer was to unilaterally withdraw the request without explanation. (SBL Ex. 6, p. 26) For the next several months, through counsel, in writing and in telephone and personal consultations, Sobel repeatedly sought to answer any concerns of the Bureau, offering to come to Washington or Gettysburg to meet personally and answer any questions. (SBL Ex. 6, pp. 28, 34, 39-40) In the context of these discussions, the Bureau was expressly told that there was a written management agreement between Sobel and Kay and that a copy had been produced during discovery in the Kay proceeding. The Bureau never accepted Sobel's offer to meet and provide information informally. Instead, on 11 June 1996 the Bureau issued another 308(b) request, virtually identical in substance to the one it had inexplicably withdrawn less than five months earlier. (SBL Ex. 6, pp. 36-37) Sobel answered this request fully and in timely fashion, including providing yet another copy of the written management agreement. (SBL Ex. 6, pp. 39-44)

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[9] By analogy, ITS, the Commission's copy contractor, contracts with the public to provide copies of FCC documents and collects and receives all the revenue generated therefrom. It does so pursuant to a contractual arrangement with the Commission. It would be absurd to suggest, however, that ITS does business in the Commission's name, and it is equally absurd for the Bureau to suggest that Sobel does business in Kay's name.

24. Let us review the bidding. Out of concern that his application processing had been frozen because of his association with Kay, and upon learning that the Commission apparently was under the false impression that he did not exist, but was instead a fictitious name being used by Kay, Sobel wrote to Gary Stanford of the Bureau staff, stating the fact that he was indeed a separate person and business entity, distinct from Kay. In that letter, Sobel expressly acknowledged a business relationship with Kay and offered to provide additional information if needed by the Commission. The Bureau never responded to Sobel's letter or his offer of additional information. As Sobel testified:

> Q Did the Commission, in response to any inquiries you made about your applications, ever communicate to you specifically, what their problems or concerns were?
>
> A They totally and absolutely ignored me.
>
> Q So, you did not even know officially what their concern was?
>
> A No. They would not tell me. In fact, they refused to. I sent the letter to Mr. Stafford, and I never heard from him. He never called me back. He never sent me any information to say why my finder's preferences were held. And this is far before all this stuff. Hey, I was in the dungeon, and there was nothing I could do about it.

(Tr. 304-305) Shortly following the Stanford letter, the Commission issued a hearing designation order in the Kay proceeding, and the order included language indicating that Commission still believed that Sobel was a fictitious alter-ego of Kay. Sobel believed the matter would get sorted out in the Kay hearing. When presented with an affidavit by Kay's attorney that, just as the Stanford letter, merely asserted Sobel's separate identity from Kay, Sobel (who was not a party to the Kay proceeding) found it to be factually correct and signed it. In the meantime, Sobel continued his efforts to have processing on his own applications resumed. He repeatedly asked for an explanation of the Commission's concerns, if any, and repeatedly offered to provide any information that might help resolve the matter. Sobel's entreaties were ignored and rejected.

25. At no time prior to the 308(b) requests in 1996 did the Bureau ever give Sobel any indication that it was concerned about or even interested in the details of the business arrangements between Sobel and Kay. Sobel's efforts up to that point were directed at (a) correcting the Commission's apparent belief that he was a fictitious alter-ego of Kay, and (b) to get the staff to resume processing of his applications. When the Bureau finally asked for the details of the business dealings between him and

Kay, Sobel timely and honestly provided such information, including providing the Bureau with yet another copy[10] of the written agreement. After answering the 308(b) request, Sobel continued to press the Bureau for some resolution of his situation or, at a minimum, a concise statement of any concerns the Bureau might have so that he could attempt to address and/or remedy them. Still Sobel was ignored. It was not until the United States Court of Appeals for the District of Columbia Circuit ordered the Commission to respond to Sobel's *Petition for Writ of Mandamus* (SBL Ex. 6) that the Bureau finally took some action. Sobel's "reward" for having promptly, completely, and forthrightly answering the Bureau's 308(b) inquiry; the "response" to his repeated requests to meet with the Bureau staff to discuss and attempt to resolve its concerns; and the "thanks" for his repeated offers to voluntarily provide the Bureau with any additional information it required was to be summarily designated for a license revocation hearing.

26. The Bureau would have us believe that Sobel was, all this time, maneuvering and manipulating to prevent the Commission from learning about the agreement between him and Kay. When viewed against the evidence in the record, this theory is preposterous. The Bureau attempted to lead Sobel into its own interpretation, but to no avail:

> Q Now, Mr. Sobel, you understood that the purpose of this affidavit would be used in an attempt to get your licenses out of the Kay hearing?
>
> A It was going to happen anyway. They had a royal screw up. It was like giving me a parking ticket for his car. They thought I was a ghost. They named me as an a/k/a of James Kay. The order was against him. They can't take my licenses away when they try to prosecute him. It doesn't work. So, it was going to get separated eventually anyway.
>
> Q But you understood that this affidavit would be used to try and move that process along so your licenses would get taken out of that hearing. Correct?
>
> A I kind of had to raise my hand and say, "Yeah, I'm a person here." The application [sic] stated in the very first line, "I am individual, entirely separate." I am not James Kay. The purpose was to establish to the Bureau that I am not an a/k/a of Mr. Kay. I am a real living person and they screwed up.

(Tr. 142-143) It is clear that Sobel's state of mind at the time he executed the affidavit was not an intention to deceive or mislead the Commission regarding the nature and extent of his relationship with Kay, but rather a desire to show the Commission that he was not a "ghost."

[10] The Bureau had already obtained a copy of the management agreement in discovery in the Kay proceeding, and Sobel's counsel had previously reminded the Bureau of this fact.

27. If Sobel wanted to conceal the relationship, why would he have reduced it to writing at a time when he knew Kay was about to designated for a hearing in which Sobel's own name was at issue? While he does not have a law degree and may not fully grasp or appreciate all the potential nuances of the term "interest" as a matter of law, he is by no means stupid. Yet, to adopt the Bureau's theory, one would have to assume that Sobel harbored a reasonable expectation that his relationship with Kay would escape scrutiny in the Kay hearing, a position not supported by the record. And even that absurd assumption does not explain why he would put the arrangement in writing. The more credible position is the truth, as testified to by Sobel, namely, (a) he reduced the relationship with Kay to writing because, in view of an apparent misunderstanding by the Commission, he wanted to document his distinctness from Kay; (b) he believed in January 1995 that the Bureau already had or would shortly obtain a copy of the written agreement between him and Kay; and (c) he fully expected that his relationship with Kay would be explored in the Kay license revocation hearing, not because the Bureau had theretofore expressed any interest in the details thereof, but because of the patently ridiculous assumption that he and Kay were one and the same would certainly fall under the scrutiny of the hearing.

D. Conclusion

28. The record supports the conclusion that Sobel has, at all times, acted in good faith and has been honest and candid with the Commission. If there is any credible evidence to the contrary, the Bureau has not produced it, notwithstanding years of investigation, months of discovery, and a full evidentiary hearing on the issue. In a case involving such serious charges (misrepresentation and lack of candor) and such drastic sanctions (revocation and total disqualification), it is not enough that the Bureau string together suggestions and possibilities. It is incumbent upon the Bureau to present solid proof that Sobel is guilty of the wrongs alleged and, if so, that the requested penalty is warranted. The Bureau has utterly failed to carry these burdens. The misrepresentation and lack of candor issues must be resolved in Sobel's favor.

II. THE TRANSFER OF CONTROL ISSUES

A. INTRODUCTION

29. This proceeding was initiated by the *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing and for Forfeiture*, FCC 97-38, 6 C.R. 641 (released 12 February 1997). The Commission designated the following issues for resolution:

(a) To determine whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications have willfully and/or repeatedly violated Sec. 310(d) of the Communications Act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations to James A. Kay, Jr.;

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications are qualified to be and remain Commission licensees;

(c) To determine whether the above-captioned applications filed by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be granted.

(d) To determine whether the above-captioned licenses held by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be revoked.

Id. at 6. As required by Section 312(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(d), the burden of proceeding with the introduction of evidence and the burden of proof were placed on the Bureau, a party to the proceeding, as to issues (a), (b), and (d). The burden of proceeding with the introduction of evidence and the burden of proof as to issue (c) were placed on Sobel. *Id.* at 10. Sobel has already addressed these issues in detail in his own *Proposed Findings of Fact and Conclusions of Law* ("*Proposed Findings and Conclusions*") submitted on 25 September 1997. His discussion herein will be limited to responding to specific points raised in the *WTB Findings*.

30. Sobel demonstrated in his *Proposed Findings and Conclusions* that his arrangements with Kay regarding the 800 MHz stations does not constitute a transfer of control. The Bureau's advocacy for a contrary result is based on a misunderstanding and/or mischaracterization of the business relationship between Sobel and Kay, and a misapplication of the relevant legal precedent. The Bureau has not even offered evidence of any motive on the part of Sobel or Kay to engage in an unauthorized

transfer of control. The Bureau has not shown why, if Kay wanted these licenses, he would not have simply filed for them in his own name. The record shows, however, that the applications were made in Sobel's name for the simple reason that Sobel decided to apply for 800 MHz licenses and asked his friend and business associate for assistance in that endeavor. If there was a transfer of control, and Sobel does not concede that there was, it was certainly inadvertent.

B. THE NATURE OF THE SOBEL-KAY BUSINESS ARRANGEMENT

31. Before turning to a specific factual and legal analysis of the record under the transfer of control issues, it is important that two aspects of the business relationship between Sobel and Kay be properly understood. First, regardless of what one may or may not think about the business deal Sobel struck with Kay regarding the 800 MHz stations, the fact remains that Sobel is an independent business entity in his own right. Notwithstanding his close personal friendship and extensive business dealings with Kay, Sobel is neither an employee of or partners with Kay. Second, as to the 800 MHz stations, the arrangement between Sobel and Kay is in essence and actuality a channel capacity lease or an airtime resale arrangement.

(1) Sobel's Independence From Kay

32. The Bureau has seized upon every minor detail it can find (or fabricate) to paint Sobel as a mere peon of Kay. The Bureau ignores the vast majority of Sobel's business activities that have nothing whatsoever to do with Kay (*e.g.*, his 450 MHz repeater operations and more the substantial majority of his consulting and service activities), and instead chooses to focus on the minority of his business that is done with Kay. The Bureau avoids the reality that Sobel has his own place of business, his own business equipment, his own business vehicle, and his own business financial arrangements, all of which are separate and apart from those of Kay. To be sure, Sobel does a significant amount of service work for Kay, but the record clearly establishes that such services are performed by Sobel as an independent contractor. The Bureau, unable to provide any contradictory evidence, nonetheless attempts to avoid the fact that Sobel is not and never has been an employee of Kay. The evidence developed at hearing shows that Sobel and Kay are two separate businessmen, distinct from one another, and that the arrangements they entered into with respect to Sobel's 800 MHz stations was a considered, arms-length business deal between two close friends and business associates.

33. Throughout its pleading, the Bureau reiterates the fact that Sobel performed various services for Kay. *E.g.*, *WTB Findings* at 6-8. The Bureau conveniently de-emphasizes, however, the fact that all services performed by Sobel for Kay were undertaken on an independent contractor basis. Sobel is not and never has been an employee of Kay. If one simply follows the Bureau's logic to its ultimate conclusion, the absurdity of it becomes clear. There are any number of land mobile equipment and service companies who hold their own licenses while also performing contract services for other land mobile licensees. Motorola has been perhaps the most obvious example of this over the past few decades. But the performance of these contract services has never been held to transform the subcontractor into an employee of the agent. Sobel and Kay both testified that Sobel has never been an employee of Kay, and Sobel has presented tax records consistent with his claim of independent contractor status. The Bureau has offered no contradicting evidence. Sobel also has unfettered access to Kay's computerized billing system which allows him to determine which customers are activated on which channels. This allows him to know which customers are on his 800 MHz stations and to monitor the revenue levels to determine when the $600 revenue level is reached.

34. The Bureau also plays number games in an effort to mischaracterize the magnitude of contract services performed by Sobel for Kay. The Bureau compares the total revenue received from Kay with Sobel's gross income (rather than his gross revenues). This is an inappropriate apples-to-oranges comparison. It measures the gross revenues received from Kay (before deduction of costs) against Sobel's net income (total income after deduction of costs). The table below shows the degree of resulting overstatement by the Bureau.

Tax Year	% Received From Kay		Resulting Bureau Overstatement
	Gross Revenue	Gross Income	
1996	10.0%	12.5%	2.5 percentage points
1995	14.2%	20.5%	6.3 percentage points
1994	11.8%	18.3%	6.5 percentage points
1993	16.8%	21.9%	5.1 percentage points
1992	13.2%	19.6%	6.4 percentage points

That the Bureau finds it necessary to resort to "creative" mathematics reveals its own misgivings about its case. That the Bureau is willing to proffer such a misleading interpretation of the facts reveals that it is more concerned with winning a case rather than finding the truth.[11]

35. The Bureau erroneously asserts that Sobel and Kay do not distinguish between Sobel's 800 MHz stations Kay's own stations. *WTB Findings* at 41-44. There are a number of significant distinctions. Sobel directs, reviews, approves, and signs all FCC filings and correspondence relating to his own stations. Sobel also has veto rights over all customer contracts for his own stations, and he is entitled to a split of the revenue above $600 per repeater for services provided on his own stations. Although Sobel consults with Kay regarding the placement of customers and the rates to be charged, Sobel has the final say as to his own stations and has exercised this right to overrule Kay on occasion.

36. The only thing in the record the Bureau can point to in support of its contention that the Kay and Sobel stations are indistinguishable is the fact that Kay's employees, in the discharge of their day-to-day duties, do not necessarily know or care which customers are being served on Sobel's repeaters as opposed to repeaters owned by Kay. This is true because the owner of the repeater is not relevant to the functions of these employees. Kay is selling service to end users on a retail basis. Some of the capacity is sold by Kay as a facilities-based carrier, and some capacity is sold by him as a reseller. It is not necessary for Kay's customers to be able to distinguish between these on a day-to-day basis, and the fact that they do not so distinguish does not evidence a transfer of control. (Tr. 374-376) By analogy, when a businesswoman makes a long distance telephone call, she has no knowledge whether the facilities used to transport that call are in fact owned by her chosen interexchange carrier, or whether some or all of them are being obtained on a resale basis from a third party. The answer to this question will vary on a call to call basis. The mobile dispatch business is similar. Different end users require and

[11] The Bureau also totally mischaracterizes the buy/sell agreement that provides for Kay's purchase of most of Sobel's business assets from Sobel's widow in the event of Sobel's demise. *WTB Findings* at 34-35. (WTB Ex. 47) First, the Bureau improperly attributes the $200,000 purchase price to the 800 MHz repeaters, when the agreement actually applied to Sobel's UHF licenses and other business operations, not the 800 MHz stations. (The 800 MHz stations are already subject to the option that could be exercised by Kay upon Sobel's death.) Second, the $200,000 purchase price stated in the agreement is a current value, and the agreement provides for future adjustments based on actual performance. The agreement in no way constitutes a transfer of control of the UHF stations to Kay. It is simply a means, typical among many small businesses of all types, for Sobel to provide for his survivors. It gives Kay no current rights whatsoever, and the contingent rights afforded Kay are not triggered except upon Sobel's death. (Tr. 137-141, 201-204)

are willing to pay for varying capacity levels and differing geographic coverage configurations. Who owns each of the individual repeaters used to satisfy their needs is not relevant. To hold that this indifference constitutes a transfer of control will be to outlaw virtually every resale arrangement throughout the wireless mobile telecommunications industry.

(2) The Resale Nature of the Sobel-Kay Arrangement

37. Perhaps the single biggest reason for the Bureau's misgivings about the relationship with Sobel and Kay (aside from the Bureau's inherent mistrust of anything with which Mr. Kay is involved) is the Bureau's unwillingness or inability to grasp the nature of the relationship. Regardless of the words used to describe and characterize the relationship, what the relationship boils down to is a reseller (Kay) obtaining capacity from a facilities-based licensee (Sobel) in order to market airtime to end users. Sobel obtained licenses from the Commission in his own name. He leased equipment from Kay, constructed the stations, placed them into operation, and maintains them in good working order. Kay markets 800 MHz repeater services to end users. He obtains the capacity he requires for that function from a variety of sources. Much of the capacity comes from stations licensed to Kay in his own name. But some of it also comes from stations licensed to Sobel or others which Kay only "manages".

38. Every single function performed by Kay, and virtually the only functions performed by Kay, relate to the service of customers. Kay contracts with customers, Kay assigns users to the system, and Kay collects the revenue. Every single function performed by Sobel, virtually none of which is performed by Kay, relate to the operation of the stations. Sobel installed the equipment, Sobel maintains and repairs the equipment, Sobel activates the customers, and Sobel maintains the control points. When seen in this light, the functions performed by Sobel and Kay, respectively, are not significantly distinguishable from the roles of facilities-based carrier and reseller. Sobel operates the facilities and provides the raw capacity to Kay who sells service to the public. (Tr. 90, 128, 153, 190-192, 374-376)

C. THE APPLICABLE LEGAL STANDARDS

39. The Commission has long recognized that there is no exact formula by which control of a Title III authorization can be determined. The determination of whether a transfer of control has occurred requires looking beyond the legal title to determine whether there are any actions reflecting a new entity or individual with the right to determine the basic policies and ultimate control of the station. See, *WHDH,*

Inc., 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Whether there has been a transfer of control is a question of fact that must be resolved by examining the specific circumstances on a case-by-case basis. In *Intermountain Microwave*, 24 RR 983 (1963), the Commission typically considers the following six indicia of control:

(a) Does the licensee have unfettered use of all facilities and equipment?

(b) Who controls daily operations?

(c) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?

(d) Who is in charge of employment, supervision, and dismissal of personnel?

(e) Who is in charge of the payment of financing obligations, including expenses arising out of operating?

(f) Who receives monies and profits from the operation of the facilities?

See also HDO at ¶ 4.

(1) TRANSFER OF CONTROL IN THE CONTEXT OF THE SMR INDUSTRY

40. The *Intermountain Microwave* criteria are not a mere mechanical check list from which one may tick off items to arrive at an objective determination of control. As the Commission has explained

> [t]he *Intermountain* factors represent the normal incidents of responsibility for the operation and control of a common carrier facility. ... As such, they generally provide useful guidelines for evaluating real-party-in-interest and transfer of control questions. *We stress, however, that there is no exact formula for determining control and that questions of control turn on the specific circumstances of the case. ... Thus, in applying the Intermountain criteria, we examine the totality of the circumstances.*

La Star Cellular Telephone Company, 9 FCC Rcd 7108, 7109 (1994) (emphasis added), *citing Data Transmission Co.*, 44 FCC 2d 935, 936 (1974). No single factor in itself is controlling, rather, each particular situation is unique and must be carefully evaluated in light of all six factors. *Volunteers in Technical Assistance*, 1997 FCC LEXIS 4947 (FCC 97-308; released 11 September 1997).

41. The answers derived from application of *Intermountain Microwave* will vary from service to service and, even within a particular service or industry, will vary from case to case. In the broadcast services, for example, station programming has been a significant area of consideration, *e.g.*, *S.W. Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981), while this is not of as much, if any, regulatory

concern in common carrier and other radio services that do not dictate content, but rather provide a telecommunications "conduit" for their customers or subscribers. *Cablecom General, Inc.*, 87 FCC 2d 784 (1981). As to SMR and dispatch services, the Commission has stated:

> As the SMR industry has matured, licensees have inevitably sought to avail themselves of a variety of methods to operate and manage their systems. In this dynamic and developing marketplace we wish to allow maximum flexibility to these entrepreneurs, consistent with the regulatory restraints imposed by the Communications Act. We also wish to assure licensees may employ a variety of options so that they may provide an efficient and effective communications service to the public as quickly as possible. In light of theses policy objectives, and as a general proposition, *we see no reason why SMR licensees should be precluded from hiring third parties to manage their systems provided that that the licensees retain a proprietary interest, either as owner or lessee, in the system's equipment and exercise the supervision the system requires.*

Motorola, Inc. (*Order*, issued 30 July 1985, File Nos. 50705 *et al.*) at ¶ 18.[12]

42. In *Motorola* the Commission went on to approve management agreements in which the manager leased the equipment to the licensee and provided the service to the customers, including billing and collection, in exchange for 80% of the gross revenue, and the licensee had no hands-on, day-to-day involvement. *Id.* The Sobel-Kay arrangement compares favorably to this from a transfer of control standpoint. Sobel maintains active operational control of the facilities. He has a proprietary interest in the equipment by virtue of a lease arrangement with Kay, and Sobel shares equally in all revenue above $600 per month per repeater. Sobel has simply struck a beneficial business arrangement that should not be second guessed by the Commission. "As long as the licensee maintains the requisite degree of control ... consistent with its status as a licensee, [the Commission] will not question its business judgment concerning the agreements into which it enters." *Motorola, Inc.* at ¶ 21.

43. The Bureau may demur to Sobel's reliance on *Motorola*, on the grounds that the Commission now applies *Intermountain Microwave* to Commercial Mobile Radio Service ("CMRS") licensees. *Cf. Fourth Report and Order in GN Docket No. 93-252*, 9 FCC Rcd 7123 at ¶ 20 (1994). But *Motorola, Inc.* is entirely consistent with *Intermountain Microwave*; it simply takes into account the unique nature of the SMR industry. Moreover, Sobel's status as a CMRS as opposed to a Private Mobile Radio Service ("PRMS") licensee is uncertain insofar as his stations are not actually interconnected to the public

[12] Although not officially reported, the *Motorola* decision has become the lead case on the issue of whether SMR or dispatch management agreements constitute transfers of control. A copy of the decision (the best copy available to counsel) has been appended to this pleading for convenience of the Presiding ALJ and the parties.